FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 12 1960
JAMES R. BROWNING, Clerk

No. 254

In the Supreme Court of the United States

OCTOBER TERM, 1960

RUSSELL BUFALINO, PETITIONER

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	6
Argument	13
Conclusion	18

CITATIONS

Cases:

Caiozzo v. *District Director*, 158 F. Supp. 872	15
Matter of D'O , B.I.A. Interim Decision No. 970	15
Matter of G , B.I.A. Interim Decision No. 972	15
Hintopoulos v. *Shaughnessy*, 353 U.S. 72	17
Matter of Y , B.I.A. Interim Decision No. 975	15

Statutes and Regulations:

Act of September 11, 1957, Section 7, 71 Stat. 640 (8 U.S.C. 1251a)	3, 14
Immigration and Nationality Act of 1952:	
Section 241, 66 Stat. 204 (8 U.S.C. 1251)	2, 14
Section 244, 66 Stat. 214 (8 U.S.C. 1254)	1, 16
24 F.R. 6477	15

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 254

RUSSELL BUFALINO, PETITIONER

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 277 F. 2d 270.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1960. A petition for rehearing was denied April 27, 1960. The petition for a writ of certiorari

was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record supports the Attorney General's conclusion that the petitioner failed to show that noncompliance with the alien registration provisions was not willful or was reasonably excusable.

2. Whether petitioner was entitled to relief under Section 7 of the Act of September 11, 1957 which provides relief for certain entries into the country by fraud.

3. Whether there was basis for the denial of the discretionary relief of voluntary departure.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 204 (8 U.S.C. 1251) provides in part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * *

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or * * *

* * * *

Section 7 of the Act of September 11, 1957, 71 Stat. 640 (8 U.S.C. 1251a) provides:

The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided*, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or resi-

dence, or elsewhere. After the effective date of this Act, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, shall hereafter be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.

Section 244 of the Immigration and Nationality Act of 1952, 66 Stat. 214 (8 U.S.C. 1254) provides in part:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * *

(5) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241(a) as a person who has remained longer

in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a), (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately pre-

ceding his application for voluntary departure under this subsection.

STATEMENT

The petitioner was ordered deported on three charges (R. 88a): (1) entering without inspection in violation of Section 241 (a)(2) of the Immigration and Nationality Act of 1952; (2) failing to comply with the alien registration provisions in 1956 and 1957 in violation of Section 241 (a) (5) of the Act, and (3) entering when excludable by law because he did not possess a reentry permit or other valid entry document in violation of Section 241 (a) (1) of the Act (R. 47a-49a).

1. At the deportation hearing of January 2, 1958, the Special Inquiry Officer explained each of the charges to the petitioner, who said he understood them (Tr. 7-8).[1] In connection with the second charge the Officer stated in part (Tr. 7):

> * * * In other words, the law requires that every alien submit certain information, including his address, during January of each year to the Immigration and Naturalization Service, acting as the delegate of the Attorney General. Under the law a person is deportable if he fails to do that and if he does not have a good excuse.

---

[1] We have filed a certified transcript of the hearings in two volumes each separately paginated. Volume one will be referred to by the prefix "Tr."; Volume two, which contains the reopened hearings, by the volume number II and Tr. page. We have also filed three volumes of Exhibits, consecutively numbered, which will be referred to by the prefix "Ex.".

> If a person has a good reason which is excusable, he is not deportable; if he did not do it wilfully, he is not deportable. By wilful is meant he deliberately, purposely did it. In other words, a person knows he is required to do it and refuses to do it. Do you understand the second charge?
>
> A. Yes.

Also at this hearing, the petitioner's counsel obtained a continuance until January 20, 1958, in part to obtain a birth certificate, stating (Tr. 2): "Our case is based on the fact that Mr. Bufalino was born in Pittston, Pennsylvania." At the continued hearing on January 20, 1958, the petitioner's counsel requested a further continuance because the birth record previously sought had been impounded (Tr. 9-10). The continuance was denied in part as there had been no request for the issuance of a subpoena (Tr. 11), and the petitioner's counsel admittedly had all the information contained in the birth record docket (Tr. 12).

2. At the hearing, it was stipulated (Ex. 8) that the petitioner entered the United States on April 30, 1956, and May 5, 1956, each time claiming he was a citizen of the United States; that he had no valid entry document, and that he failed to notify the Attorney General of his address during January 1956 and 1957 (Ex. 8). Exhibit 20, admitted over objection, was a certified and authenticated record of the petitioner's birth in Montedoro, Italy, on September 29, 1903 (Tr. 48-49). Thereafter, at the opening of the hearing on January 22, 1958, the peti-

tioner conceded alienage (Tr. 54). Thus, the petitioner conceded two of the three charges—the charges of deportability for entry without inspection (Section 241 (a)(2)) and entry without a valid entry document (Section 241 (a)(1)). However, while admitting failure to register with the Attorney General under the charge founded on Section 241 (a)(5), the petitioner did not "concede that such failure to report was wilful" (Tr. 58). He also, as the spouse of an American citizen, applied for relief under Section 7 of the Act of 1957, pre-examination, and voluntary departure.

3. On the issue of willfulness, the petitioner claimed that (Tr. 110): "Prior to Monday of this week, I honestly and sincerely believed I was born in Pittston, Pennsylvania." He testified that since he did not know the date, he had adopted a birth date—October 29, 1903 (R. 3a; Tr. 185-186). The petitioner had given that date and Pittston as the place of birth in his social security and selective service applications (R. 5a). In his marriage license and Elks membership, he said he was born in Pittston in 1904 (Tr. 188-189). A 1947 voting registration lists the petitioner as born in Buffalo in 1905 (Tr. 191).[2] The petitioner's sisters and brother said they did not know where the petitioner was

[2] The petitioner explained the wrong date of birth on his marriage license application and Elks application by claiming—"They must have made a mistake" (Tr. 188-189). As to his voting registration from West Pittston, which indicated his birth as Buffalo, New York, on November 29, 1905, he said, "Somebody made a mistake there" (Tr. 191).

born, but claimed they had heard he was born in the United States (Tr. 19, 35-36, 42, 45).

It was shown that the petitioner had first entered the United States from Italy in December, 1903, at the age of two months, and again in January, 1906, at age 2. He was taken back to Italy in the fall of 1910 (at age 7) and returned to the United States in February, 1914 (age 11) (R. 9a-10a; Tr. 49-51).

A vocational school record of 1917 indicated the petitioner's place of birth as "Italy" (Tr. 183, Ex. 49); the petitioner's school record in Buffalo in 1914 indicated he was born in "Italy" (Tr. 183-184, Ex. 50); the Pittston school record in 1915 showed his place of birth as "Italy" (Tr. 184, Ex. 51) and the New York school record in 1910 indicated his place of birth as "Italy" (Tr. 184, Ex. 52). In September, 1944, Mr. Barbara, whom the petitioner described as a good friend (Tr. 163), in filing a report in connection with workmen's compensation as a result of an accident, listed the petitioner's nationality as "Italy" (Tr. 193, Ex. 55).

The evidence further showed that a Mary Louise Bufalino, who had worked as a clerk in the Luzerne County Court at Wilkes-Barre, Pennsylvania, since September 15, 1940, admitted she had placed on the docket of Luzerne County (Tr. 76-78) an entry purporting to show that Russell Bufalino was born October 29, 1903, in Pittston Township (Ex. 29). She claimed she merely transcribed this record from the original (Tr. 78-79) which purported to show that the birth was reported December 14, 1903 (Tr. 73).

The petitioner claimed he did not know of the existence of the Luzerne County birth record (Tr. 189-190).

The petitioner submitted 158 affidavits as to his good moral character (Tr. 245, Ex 59). On March 5, 1958, after the deportation hearing was reopened on the representation of the Immigration and Naturalization Service that fraudulent evidence had been presented, the petitioner's counsel requested the return of Exhibit 59—the good moral character affidavits—and offered to substitute 128 new affidavits (Vol. II, Tr. 2). The withdrawal request was denied, but new affidavits were accepted (Vol. II, Tr. 3). Mr. Bert R. Ardoline and Miss Rose Mitchell, notaries on the original affidavits, stated that none of the 158 affidavits had been notarized in front of the affiants except for the affidavit signed by Miss Mitchell's brother (Vol. II, Tr. 5, 12). There were new affidavits by some of the signers of original affidavits (who previously had stated they were closely associated with the petitioner) that they never had a conversation with the petitioner (Vol. II, Tr. 27-30).

4. In his application for pre-examination the petitioner listed his employment for the past five years as follows (Ex. 35):

Name & Address of Employer	Type of Work & Salary	From	To
Bonnie Stewart	Efficiency Man $200 per week	1950	1953
Penn Drape Co.	Self employed	Dec. 1953	To date
Fairfrax, Inc.	Efficiency Man $125 per week	Dec. 1953	To date

There was evidence that this information was not complete (Vol. II, Tr. 32-35, 51-52, 149, 177.)

5. The Inquiry Officer after reviewing all the evidence held (R. 84a):

> I am convinced that in all these matters, respondent knowingly and deliberately told less than the truth. His assertion that prior to these proceedings he had no knowledge of the false birth record, which had been created in his name in the Luzerne County records, is, in my view, devoid of plausibility. From my observation of respondent's demeanor and upon appraisal of all his testimony, it is my finding that his claim that prior to January 20, 1958, he had always believed that he was born in Pittston, Pennsylvania, is unworthy of credence, and was, indeed, offered by respondent in these proceedings with full knowledge of its falsity.

The Inquiry Officer held that the petitioner was not entitled to relief under the first sentence of Section 7, because the petitioner was not "otherwise admissible at the time of entry", in that he failed to possess any entry documents. He noted that while such documents could be waived at the discretion of the Attorney General, there was no request for such waiver, nor would such have been granted if requested since the petitioner's failure to obtain documentation was the result of his wilfull attempt to conceal his alienage (R. 85a-86a).

The Inquiry Officer further concluded that the petitioner was not entitled to voluntary departure both on the ground that he had not been physically

continually in the United States for ten years and had not shown himself to be of good moral character (R. 86a-87a). Although reference was made to the petitioner's claim of privilege before bodies investigating a meeting at the home of Barbara in Apalachin, New York (R. 61a),[3] the Inquiry Officer specifically noted that the record did not establish that the petitioner was a "mobster" and the findings and order were not influenced by the statements in the press (R. 88a).

The Board of Immigration Appeals thought that, before deciding whether the second charge should be upheld as well as denial of discretionary relief, the proceedings before a Senate Investigating Committee should be made a part of the record (R. 90a-91a). However, the Attorney General reversed this part of the holding and directed the Board to proceed to a final decision (R. 91a-92a). On September 2, 1958, the Board rendered its final decision and affirmed the Special Inquiry Officer's holdings (R. 100a-110a).

6. The petitioner attacked the order of deportation and the denial of discretionary relief by an action in the United States District Court for the Eastern District of Pennsylvania.

On April 8, 1959, the district court, in granting a motion for summary judgment on the record, upheld the deportation order (R. 111a-113a). This was affirmed by the third circuit on April 1, 1960.

---

[3] The petitioner did answer questions as to presence there in the immigration hearing (Tr. 221-223).

ARGUMENT

The petitioner's attack on the administrative proceedings is essentially an attempt to overturn the finding of the Special Inquiry Officer that the petitioner had proved himself not worthy of belief. If, as the hearing officer found, the petitioner did deliberately conceal the fact, known to him, that he was an alien, it follows that his failure to register could not be excused as not willful. And if the petitioner sought to give and present false evidence in the administrative hearings, that in itself establishes that he was not of good moral character to be entitled to discretionary relief. There is no reason not to accept the finding of the Special Inquiry Officer who saw and heard the petitioner, for, not only is the petitioner's testimony evasive on its face, but, as set forth in the Statement, *supra*, it was shown to be false in many particulars. There is therefore no occasion for further review by this Court.

1. There is no merit in the contention (raised for the first time in a petition for rehearing in the court of appeals) that no attention was given to the legal content of the term "willful" in the applicable statute. At the very first hearing, the Inquiry Officer explained the term willful to the petitioner.

The petitioner sought to sustain his burden of satisfying the Attorney General of the fact that his failure to register was not willful on the basis that he "believed" he was born in Pittston, Pennsylvania. He failed in that attempt, not because of any misunderstanding as to the legal standard, but because

his testimony was properly found incredible in the light of the entire proof.

2. The foregoing point, in effect, is dispositive of this case, and the petitioner so recognizes by limiting his second question involving the application of the relief provisions of Section 7 of the Act of September 11, 1957, *supra*, to the conceded charges under Sections 241 (a) (1) and 241 (a) (2), and not to Section 241 (a) (5) which was involved in paragraph 1 above. Clearly no Section 7 relief is afforded for the deportable charge of failing to register as set forth in Section 241 (a) (5). This is so, because to the extent applicable Section 7 cures only fraudulent entry under certain circumstances; it does not provide relief for acts which give rise to deportability after entry, such as the failure to register.

In any event, the petitioner has not shown himself to be entitled to any relief under Section 7. The first sentence of Section 7 provides relief from deportability in certain circumstances for fraudulent entry, provided an alien is "otherwise admissible." The petitioner claims that his lack of proper entry documents, which the Special Inquiry Officer found made petitioner "otherwise inadmissible", was part of and grew out of the fraud and that therefore the petitioner qualified for relief (Pet. Br. 10). This is fallacious. Under such a construction any fact which makes an alien "otherwise inadmissible" would be part of a fraudulent entry and hence the phrase would be meaningless. Here the petitioner entered fraudulently by stating he was a citizen. If he had told the truth—i.e. that he was an alien—he would

have been "otherwise inadmissible," for lack of entry documents.

Next, the petitioner complains that the failure to waive entry documents was "untenable" (Pet. Br. 10), since the statute forgives fraud. If this were the case, Congress could easily have inserted such a legislative waiver in the statute. The case cited by the petitioner—*Matter of Y———*, B.I.A. Interim Decision No. 975—recognizes the need for administrative waiver. In fact in that case the alien previously had an identification card. See also *Matter of D'O ——*, B.I.A. Interim Decision No. 970 and *Matter of G ——*, B.I.A. Interim Decision No. 972. Of course, the question of waiver is not properly presented on this record, because the petitioner—for his own strategic reasons—made no application for such waiver (R. 86a).[4]

3. The petitioner complains that he was improperly denied discretionary relief because (a) his previous invocation of the Fifth Amendment should not have been considered, (b) there was an improper construction of Section 244 (e) of the Act, and (c) the Special Inquiry Officer's decision was not based upon substantial probative evidence.[5] None of these arguments has merit.

---

[4] The petitioner's claim that no consideration was given to Section 212(c) of the Act (Pet. Br. 11), first raised in the petition for rehearing, is of no aid since, even assuming its applicability, it still depends on the same discretionary action of the Attorney General, which was refused.

[5] It is noted that pre-examination relief is no longer available. 24 F.R. 6477 (Pet. App. 18a). Further, if the government is correct in point 1, *supra*, relief in terms of voluntary departure is unavailable. *Caiozzo* v. *District Director*, 158 F. Supp. 872 (S.D. N.Y.).

a. Consideration of the petitioner's previous refusal to answer questions by invoking the Fifth Amendment privilege against self-incrimination was not a factor in the decision of this case. There is no indication that this influenced the original decision by the Special Inquiry Officer. See also R. 88a. The suggestion of the Board to add further evidence of this type was deemed unnecessary by the Attorney General (R. 91a-92a)—hardly ground for complaint by the petitioner—and, as the court of appeals noted (Pet. App. 19a), "such conduct was patently not determinative of the decisions which find ample basis in this record."

b. The petitioner claims Section 244 (e) of the Act, which provides for voluntary departure, is irrelevant to relief under Section 7 of the Act of September 11, 1957 (Pet. Br. 13). The petitioner asked for and was separately denied both (Tr. 114 and 244, R. 86). He also complains that to incorporate the 10-year requirement of Section 244 (a)(5) renders the 5-year requirement of good moral character of Section 244 (e) meaningless (Pet. Br. 13). But the two are not commensurate, since the 10-year period dates from the "act", which constitutes the ground for deportation, while the 5-year period dates from the "application" for voluntary departure. See the statute, *supra*, pp. 3-6.

c. The petitioner asserts that the denial of discretionary relief was not based upon substantial, probative evidence (Pet. Br. 13-14). This is not the standard to be applied to discretionary action as to

which, judicial review is extremely narrow and concerned with whether the denial was arbitrary. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72. In any event, not only was the petitioner's testimony on place of birth, and type and amount of income, not credible on this record, but other evidence was presented which effectively negated any possible claim of arbitrary discretionary action. The claim of good moral character, by producing a quantity of affidavits, all on printed forms including even the printing of the petitioner's name (see fn. 8 of the court of appeals' opinion, Pet. App. 8a) is certainly not conducive to obtaining discretionary relief, particularly when some "closely associated" affiants had only a "nodding acquaintanceship" (R. 80a).

Finally, as the court below noted in connection with the insertion of a false birth record for the petitioner's birth in the Luzerne County records—an obviously crucial issue at the outset of these hearings—(Pet. App. 11a),

> While appellant disclaims all knowledge of the falsity of the entry——who else but he had a motive to design this deception? His denial stretches credulity to the breaking point.

In the face of all this evidence, there was no arbitrary abuse in denying this petitioner discretionary relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

SEPTEMBER 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 583317 249